Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #822
March 1998
12 U.S.C. 85

February 17, 1998

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Dear Mr. Rosenblum:

I. Introduction

This is in response to your inquiry asking when an interstate national bank (a national bank with its main office in one state, the home state, and a branch in another state, the host state), may charge home state interest rates on its loans. You have represented that the bank desires to conduct interstate lending programs with uniform pricing policies based upon the interest allowed by its home state. You also have represented that if the bank determines to adopt such uniform pricing policies, it will include in its loan documents a choice-of-law clause disclosing to borrowers that loan charges will be governed by Federal and home state law.[1]

II. Discussion

A. Summary of issues

Under 12 U.S.C. § 85, national banks may charge interest in accordance with the laws of the state in which they are "located." The question that you pose necessarily recognizes that an interstate national bank, as will be discussed, is considered to be "located," for purposes of applying section 85, in more than one state. Thus, the issue that arises is when the national bank should look to the laws of its home state and when it should look to the laws of a host state to determine the rates that it may permissibly charge with respect to its lending activities. This, of course, requires a review of relevant statutory provisions, case law and legislative history.

1. The statute: 12 U.S.C. § 85 and judicial interpretations

Title 12 U.S.C. § 85 (section 85) provides:

[1] You also have represented that where bank loan officers provide substantial assistance to borrowers in taking loan applications in person or closing loans in person at host state branches, the bank will provide clear disclosure to this effect either orally or in writing before the borrower becomes obligated on the loan.

> Any [national] association may . . . charge on any . . . evidence of debt, interest at the rate allowed by the laws of the State . . . where the bank is located . . . . [2]

Consequently, the first issue that arises is where an interstate bank is "located." In interpreting section 85, the Supreme Court has specifically recognized that a national bank is "located" in the state of its main office.[3] Consequently, the Court concluded that a national bank, under section 85, could charge the interest rates permitted by its home state no matter where the borrower resides and despite the contacts that occur in another state.[4] In addition, the Court of Appeals for the Fourth Circuit permitted a national bank to charge rates permitted by the home state even where face-to-face solicitation and signing of all loan documents by the borrower occurred in another state.[5] Marquette, Cades and Wiseman did not address the issue of the rates that may be charged by an *interstate* national bank.[6] Further, in both the Marquette and Cades decisions, the courts specifically noted that the bank did not have a branch in the state in which the borrower resided.[7]

2. For purposes of section 85, a national bank may be located in both its home state and its host states

Since the adoption of the Riegle-Neal Interstate Banking and Branching Act of 1994,[8] (which for the first time paved the way for extensive interstate branching by national banks), the OCC has been called upon to determine whether an interstate national bank is also considered to be "located" in a host state as well as its home state for purposes of section 85.[9]

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[2] Section 85 also provides several alternative rates that may be charged by the bank. Because you do not rely on any of these alternative bases for determining the applicable interest rate, this letter does not address interest that may be charged under these provisions.

[3] Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299, 308-310 (1978) (Marquette).

[4] Id. at pp. 313-319. Cf. Wiseman v. State Bank & Trust Co., N.A., 854 S.W.2d 725 (Ark. 1993) (Wiseman) (national bank located in one state may use that state's rates in making loans to a resident of a second state even though national bank's parent company is incorporated in that second state).

[5] Cades v. H&R Block, 43 F.3d 869 (4th Cir. 1994), cert. denied, 515 U.S. 1103 (1995) (Cades).

[6] Marquette at p. 309; Cades at p. 874; Wiseman at pp.727-728.

[7] The Supreme Court stated that the bank had no branches in the borrower's state. Marquette at p. 309 and fn. 20. The court in Cades took a similar approach determining first that a bank with its main office in Delaware did not have a branch in South Carolina before it determined that the Delaware interest rates applied. See Cades at p. 874. See also Christiansen v. Beneficial National Bank, 972 F. Supp. 681 (S.D. Ga. 1997).

[8] Pub. L. No. 103-328, 108 Stat. 2338 (1994) (the Riegle-Neal Act).

[9] See OCC Interpretive Letter No. 686, September 11, 1995, reprinted in [1995-96 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-001; OCC Interpretive Letter No. 707, January 31, 1996, reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-022; OCC Interpretive Letter No. 782, May 21, 1997, reprinted

While the courts never have specifically addressed the issue of whether a national bank is considered, for purposes of section 85, to be located in a state or states in which it operates branches, based on precedents construing 12 U.S.C. §§ 36 and 94 (respectively, section 36 and section 94), the OCC determined that, for purposes of section 85, a national bank is considered to be located in states in which it maintains branches.[10] Notably, the Court in Marquette, citing Bank of California and Bougas, recognized that a bank could be considered to be "located" in a state in which it has a branch.[11]

Consequently, an interstate national bank may be "located" for purposes of section 85 in both its home state and its host state or states. As a result, the issue that arises is when a national bank should apply the usury laws of its home state, and when it should apply the usury laws of a host state, to a loan. This analysis requires a consideration of relevant statutory provisions and legislative intent.

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in [Current Binder] Fed. Banking L. Rep. ¶ 81-209.

[10] See Interpretive Letter 686 reaffirmed in Interpretive Letters 707 and 782 (relying on Seattle Trust & Savings Bank v. Bank of California, N.A., 492 F.2d 48, 51 (9th Cir.), cert. denied, 419 U.S. 844 (1974)) (Bank of California) (under 12 U.S.C. § 36(c), an interstate national bank with grandfathered branches in a state other than its home state is "situated" in the state of the grandfathered branches for purposes of establishing additional branches in that state); Citizens & Southern National Bank v. Bougas, 434 U.S. 35, 43-45 (1977) (Bougas) (for purposes of section 94 as it then existed, for venue purposes a national bank was "located" in a city or county in which it had a main office or a branch office).

[11] Marquette at p. 309, fn. 21. See also Ghiglieri v. Sun World National Association, 117 F.3d 309, 316 (5th Cir. 1997). In addition, the relationship between section 94, addressing the "location" of national banks for venue purposes, as interpreted by the Supreme Court in Bougas, and section 85, addressing the "location" of national banks for usury purposes, is clear and direct. Section 94 was originally adopted as Section 57 of the Act of June 3, 1864, 13 Stat. 116-117, but was omitted in the Revised Statutes of 1873. See Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555, 561, 568 (1963). Congress reenacted it in 1875 as an amendment to section 5198 of the Revised Statutes, codified at 12 U.S.C. § 86 (section 86), which specifically provides the remedies for violations of section 85. Id. See also 18 Stat. 320; Michigan National Bank v. Robertson, 372 U.S. 591, 594 (1963) (Michigan National). As the Supreme Court recognized in Michigan National, "when [section 94] was re-enacted [in 1875], it was appended to the provisions dealing with usury actions against national banks." Thus, the venue provisions, grounded on where a national bank was "located," provided a forum to apply the remedy specifically for violations of section 85 which, of course, also were grounded on where a national bank was "located." As noted, the Court in Bougas held that a national bank was "located" for purposes of section 94 wherever it had a main office or a branch and, even before Bougas, at least one Court of Appeals observed: "none of the cases [interpreting section 85 or 94] indicate that Congress gave one meaning to "locate" in § 94 and another meaning to the same word in § 85." See Fisher v. First National Bank of Chicago, 538 F.2d 1284, 1289 (7th Cir. 1976), cert. denied, 429 U.S. 1062 (1977) (Fisher).

3. Where a national bank is located in more than one state, which state's usury laws govern interest that may be charged by the bank?

a. The Riegle-Neal Act

The Riegle-Neal Act for the first time established a comprehensive federal statutory scheme permitting general interstate branching by national banks and by state banks.[12] Thus, Congress permitted, for the first time, national banks and state banks, as a general matter, to have main offices in one state and branches in one or more other states. In doing so, Congress recognized that this new corporate structure would raise issues with respect to the applicability of usury laws to loans made by interstate national and state banks.[13] Two provisions of the Riegle-Neal Act address interest rates that may be charged by interstate national banks.

(1) The applicable law clause

Section 103(b)(1) (the applicable law clause) of the Riegle-Neal Act provides that:

> The laws of the host State regarding community reinvestment, *consumer protection*, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except--
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> (i) when Federal law preempts the application of such State laws to a national bank . . . .

See 12 U.S.C. § 36(f)(1)(A) (emphasis added).[14]

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[12] Prior to the adoption of the Riegle-Neal Act, branching by national banks and state banks that were members of the Federal Reserve System was constrained, with certain exceptions, by federal law to intrastate branching. 12 U.S.C. §§ 36, 321. But see 12 U.S.C. § 36(a) (permitting interstate grandfathered branches); Sun World at p. 315 (following relocation by a national bank of its main office from one state to another, permitting branch retention in the former main office state). In addition, while states could permit state banks that were not members of the Federal Reserve System to branch on an interstate basis, few did. Hearing before the Subcommittee on Financial Institutions Supervision, Regulation and Deposit Insurance of the Committee on Banking, Finance and Urban Affairs, House of Representatives, 103d Cong., 1st Sess., p. 53, 56 (October 26, 1993) (Written Statement of Comptroller of the Currency Eugene A. Ludwig).

[13] While the Riegle-Neal Act raised this issue with respect to both national and state banks, because only national banks are within the regulatory jurisdiction of the OCC, this response will address the impact of the Riegle-Neal Act only on interest rates that may be charged by national banks.

[14] An exception also was provided if the Comptroller determines that the state law discriminates between an interstate national bank branch and state bank branches. Id. at (f)(1)(A)(ii). A similar provision, absent the preemption and discrimination exceptions, was adopted with respect to state banks. See 12 U.S.C. § 1828(j).

The Riegle-Neal Act Conference Report notes that the reference to host state consumer protection laws includes "applicable usury ceilings." See, e.g., H.R. Rep. No. 651, 103d Cong., 2d Sess., 51 (1994) (the Riegle-Neal Act Conference Report or Conference Report). However, with respect to state usury ceilings, application of the preemption provision in clause (i) brings into play section 85 and the standards of section 85 then govern how state usury law is made applicable to a host state branch of a national bank. In other words, the state usury law of the host state of a national bank applies to particular loans made by the bank because section 85 sets forth the framework that determines the permissible rates of interest that national banks may charge and that framework makes the host state's usury ceilings applicable (with limited exception[15]) to particular loans made by a national bank that is considered to be "located" in that state.

However, the framework of section 85 does not expressly address two crucial questions that arise when section 85 is applied to an interstate bank's lending operation:

(1) May a national bank use the rates of one state in which it is "located" even when it is doing business with customers in a second state in which it is also "located"?

(2) When a national bank is "located" in more than one state for purposes of section 85, what usury ceiling does section 85 make applicable to the bank's lending activities?

(2) The usury savings clause

Because of these uncertainties about how section 85 would apply to interstate banks, Sen. Roth introduced a provision at section 111 of the Riegle-Neal Act (the usury savings clause) which provides:

> No provision of this title and no amendment made by this title to any other provision of law shall be construed as affecting in any way--
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> * * * * *
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> (3) the applicability of [section 85] . . . . [16]

As Sen. Roth stated in explaining the intent underlying this provision:

> In order to ensure that banks providing credit to out-of-State borrowers would be unaffected by structural changes brought about by interstate branching legislation, I

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[15] As mentioned in fn. 2, supra, section 85 also provides for alternative rates. One such rate, that tied to the discount rate on commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, is not tied to state law.

[16] 12 U.S.C. § 1811 note.

> offered the [usury] savings clause in committee, and it is now part of this conference report.
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> The essential point of my amendment is that a branch of a bank that provides credit across State lines may impose its State law loan charges even though there is a branch of that same bank in the State of its customer.[17]

With respect to the usury savings clause, the Conference Report is explicit that the clause was intended to preserve existing authorities related to the interest charges that may be imposed by interstate national banks under section 85 notwithstanding the state of residence of the borrower. As the Conference Report states, the Riegle-Neal Act:

> [does] not affect existing authorities with respect to any charges under . . . [section 85] . . . imposed by national . . . banks for loans or other extensions of credit made to borrowers outside the state where the bank or branch making the loan or other extension of credit is located.[18]

Moreover, as Sen. Roth noted, prior to the adoption of the usury savings clause, the Federal Deposit Insurance Corporation was "uncertain" whether interstate branching might prevent a bank from charging home state rates to customers in host states.[19] As a result of his concern with the FDIC's response, Sen. Roth offered the usury savings clause during Senate Banking Committee consideration of the legislation. As he subsequently told the Congress:

> I immediately began to take steps to address this potential threat not only to Delaware's credit card industry but to all banks that extend credit to borrowers who reside outside the State where the bank, or under this legislation, the branch making the loan or other extension of credit is located.
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[17] 140 Cong. Rec. S12789 (daily ed. Sept. 13, 1994) (the Roth statement). As the courts have long recognized, the views of the sponsor of an amendment provide a "weighty gloss" as to the meaning of legislation." See, e.g., Galvin v. U.L. Press, 347 U.S. 522, 527 (1954).

[18] Riegle-Neal Act Conference Report at p. 63. Courts have long recognized that "Committee Reports represent the most persuasive indicia of congressional intent" and "are powerful evidence of legislative purpose." 2A Sutherland Statutory Construction §§ 48.06 (5th ed.1992 & Supp. 1996).

[19] Id. In response to a written question from Sen. Roth concerning the ability of an interstate bank to use home state interest rates in making loans to residents of host states, Andrew Hove, Jr. acting director, FDIC, explained that the effect of interstate banking in this respect was uncertain. See Nationwide Banking and Branching and the Insurance Activities of National Banks: Hearings Before the Senate Committee on Banking, Housing, and Urban Affairs, 103d Cong., 1st Sess. 272 (1993) (Response to Written Questions of Senator Roth from Andrew C. Hove, Jr.). Governor John P. LaWare of the Federal Reserve Board also expressed similar uncertainty in response to Sen. Roth's question. Id. at pp. 28-281.

> The savings clause means that the establishment of a branch in the borrower's state does not defeat the powers that a Delaware bank enjoys today under [section 85] . . . .[20]

Thus, the usury savings clause answers the first question and assures that the Marquette doctrine, permitting a bank to utilize interest rates allowed by the law of the state where the bank is located regardless of the state of the residence of the borrower, is not defeated simply because a bank has a branch in the state where the borrower resides.[21] This, then leads directly to the second question which you pose: under what circumstances may the bank use and export the interest rates permitted by its home state, as well as the corresponding question, under what circumstances may the bank use and export the interest rates permitted by a host state.

(3) Applicability of home state rates and host state rates

In discussing the interplay of the applicable law clause, the usury savings clause and section 85 in the context of interstate branching, Sen. Roth also addressed the issue of when a bank may look to home state and host state usury law in determining permissible interest rates that it may charge. He stated:

> The statement of managers expressly refers to the potential of a 'branch making the loan or other extension of credit . . . .'[22] This language underscores the widespread congressional understanding that, in the context of nationwide interstate branching, *it is the office of the bank or branch making the loan that determines which State law applies*. The savings clause has been agreed to for the very purpose of addressing the FDIC's original concerns and making clear that after interstate branching, [section 85 is] applied on the basis of the *branch making the loan*.[23]

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[20] Roth statement at S12789.

[21] It is likewise clear that the interest charges that may be imposed under section 85, as preserved by the usury savings clause, include those permitted to any lender in the state as determined by the Supreme Court in enunciating the most favored lender doctrine. Tiffany v. The National Bank of the State of Missouri, 85 U.S. 409, 413 (1874).

[22] The Riegle-Neal Act Conference Report at p. 63 discussed loans made to borrowers outside the state where the "bank or branch making the loan is located."

[23] Roth Statement at S12789. (Emphasis added.) In this regard, Sen. Roth's comments were similar to those of Sen. Riegle with respect to the impact of interstate branching on interest charges that could be imposed by national banks. As Sen. Riegle had earlier stated:

> During discussions of the interstate banking bill, Senator Pryor raised concerns about the applicability of State usury laws to out-of-state branches. He wanted to ensure that branches of out-of-State banks coming into Arkansas were subject to that State's usury ceiling. My staff consulted with his staff and we addressed his concern in the committee report on S.1963 in which we made clear State usury laws would apply to interstate branches coming into the host state.

140 Cong. Rec. S4810 (April 26, 1994). S. 1963 had provided that:

Thus, Congress had a clear recognition in the dawning age of comprehensive interstate branching, that host state rates could apply to loans made by an interstate bank. Sen. Roth went on to identify circumstances under which host state rates would apply -- that is, when a branch or branches in a host state would be considered to be making a loan. He stated:

The conferees were very careful in drafting . . . agency authority, whereby one bank may use an affiliated bank in another State as its agent with respect to some, but not all, aspects of an interstate loan.[24] What the conferees intended was to allow the principal bank in State A to use an agent bank in State B to assist with deposits and loans in a way that the law of State A would be applicable even though the agent bank in State B helped in some respects. The statement of managers correctly characterizes these permissible functions of the agent as 'ministerial.' *Excluded from the ministerial category are the decision to extend credit, the extension of credit itself, and the disbursal of the proceeds of a loan . . . .*[25] (These are referred to as the "non-ministerial functions.")

Sen. Roth applied these same principles to interstate branches.[26] As he stated:

> [I]t is clear that the conferees intend that a bank in State A that approves a loan, extends the credit, and disburses the proceeds to a customer in State B may apply the law of State A even if the bank has a branch or agent in State B and even if that branch or agent

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> Any branch of a national bank that is established as a result of a combination [under this legislation] shall be subject to the laws of the host State, including those that govern intrastate branching, consumer protection, fair lending, and community reinvestment, *as if it were a branch of a national bank having its main office in that State*.

S. Rep. No. 240, 103d Cong., 2d Sess., 30 (March 23, 1994) (emphasis added). The commentary, as did the commentary in the Riegle-Neal Act Conference Report, explicitly stated that consumer protection laws included "applicable usury ceilings." Id. at p. 17.

[24] Under this provision, affiliated banks could, at their offices, provide certain services (agency banking services) for customers of each other without being considered to be branches. 12 U.S.C. § 1828(r). With regard to lending, the statute lists agency banking services as closing loans, servicing loans and receiving payments on loans. Id. The Riegle-Neal Act Conference Report and Sen. Roth's remarks elaborate on the activities that fall within these functions: providing loan applications, assembling loan documents, providing a location for returning documents necessary for making a loan, providing loan account information and receiving loan payments. Riegle-Neal Act Conference Report at p. 49; Roth statement at S12789-12790.

[25] Id. at S12789. (Emphasis added).

[26] As Sen. Roth explained:

> Were it any other way, that is, if the branch in State B could not perform at least the ministerial functions of an agent in State B without affecting the authority of the bank in State A to apply the law of State A to the extension of credit to a customer in State B, then Congress would have constructed a significant disincentive to nationwide branching in authorizing agency powers for bank holding companies. . . .

Roth statement at p. S12790.

> performed some ministerial functions such as providing credit card or loan applications or receiving payments.
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> * * * * *
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> Thus, it is clear that a branch of a multistate bank located in State A that approves a loan application and extends credit to a customer in State B where the bank also has a branch may, under the savings clause, impose loan charges allowed by the law of State A and may, without affecting the applicability of State A's law to such charges, use its State B facility to perform some ministerial functions regarding such extension of credit.[27]

In light of the above legislative history, we conclude that the mere presence of a host state branch does not defeat the ability of a national bank to apply its *home* state's rates to loans made to borrowers who reside in that host state. However, as described by Sen. Roth, if a branch or branches in a particular *host* state approves the loan, extends the credit, and disburses the proceeds to a customer, Congress contemplated application of the usury laws of that state regardless of the state of residence of the borrower.

4. Loans where the non-ministerial functions occur in different states or in offices other than a bank's main office or branches

As discussed, Sen. Roth clearly addressed loans by interstate banks that would be considered to be "made" in a host state because each of the three elements -- the three non-ministerial functions -- occurs at a branch or branches in that host state.

Sen. Roth's three element test of where a loan is made by an interstate bank, however, creates unaddressed categories of interstate loans: that is, (1) loans where the three non-ministerial functions occur in the main office or branches in different states; or (2) loans where any of the three nonministerial functions occur**s** in an office not considered to be the main office or a branch of the bank.

In these circumstances, where the plain language and meaning of a statute, taking into consideration its legislative history, are silent as to a particular issue, the agency charged with interpreting the statute is required to render a reasonable interpretation.[28] We conclude that, for the following reasons, in circumstances, such as those listed above, where a loan cannot be said to be "made" in a

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[27] Id. We recognize that Sen. Roth's formulation of where a loan is made for purposes of applying section 85 in the new world of comprehensive interstate branching, may not be relevant for other purposes, e.g., 12 C.F.R. § 7.1003 (interpreting 12 U.S.C. § 36(j)). Of course, depending on their underlying policies, analogous but unrelated statutes may be construed differently. See, e.g., 2A and 2B Sutherland at §§ 45.15, 51.1, and 53.05.

[28] Sun World at p. 313-314.

host state under the approach laid out in the Riegle-Neal legislative history, the loan must be considered to be a bank loan and the home state's rates may always be applied.[29]

First, nothing in the Marquette decision, specifically preserved by the usury savings clause, requires that a bank must conduct certain lending activities in the home state to use the home state's rates notwithstanding the state of residence of the borrower.[30]

Second, a determination that the rates permitted by a national bank's home state may always be used, absent a statutory requirement that the laws of another state must apply, is fully consistent with the determination by the Supreme Court in Marquette that section 85 "not be interpreted so as to throw into confusion the complex system of modern interstate banking."[31] Were it any other way, in circumstances where a loan is not considered to be "made" in any particular host state taking into consideration the three elements set forth in the Riegle-Neal Act legislative history, the bank would have no state to look to for determining the applicable rate of interest. The "confusion" that the Supreme Court sought to avoid in Marquette would be unavoidable.[32]

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[29] Of course, if the three non-ministerial functions occur in the main office or in branches in the home state, under section 85, Marquette, and the Riegle-Neal Act legislative history, as discussed, the home state rates will apply.

[30] Marquette at pp. 309-313. See also OCC Interpretive Letter No. 721, March 6, 1996, reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-036.

[31] Marquette at p. 312.

[32] We note, too, that any interpretation leading to the conclusion that there was no state to which a national bank could look in determining permissible interest rates, would be the kind of result that the court in Sun World, in a different context, sought to avoid. Sun World at pp. 314-315, n. 5. In that case, plaintiff argued that following an interstate main office relocation, a national bank had to re-establish its branches in its former main office state. For a variety of reasons, the court in Sun World found the plaintiff's interpretation, that when a bank relocated its main office it had to re-establish its branches, "nonsensical" and in "sharp contrast" to the opposite result urged by the Comptroller. Similarly, a result leaving a national bank without a reference point for determining appropriate state interest rate law would be equally "nonsensical" and, for the reasons stated, we believe the appropriate state law, if a loan is not "made" in a host state in accordance with the three elements set forth in the Riegle-Neal Act legislative history, is the law of the home state.

We further note that our conclusion that, absent a federal statutory requirement otherwise, a national bank may charge interest as permitted by home state laws, is consistent with the recognition by courts of the need for a company with far-flung operations to adopt a uniform law to govern its transactions and of the appropriateness of permitting those companies to adopt the law of their headquarters state. See, e.g., Kruzits v. Okuma Machine Tool, Inc., 40 F.3d 52, 56 (3d Cir. 1994); Sarnoff v. American Home Products Corp., 798 F.2d 1075, 1082 (7th Cir. 1986). See also Clarkson v. Finance Company of America at Baltimore, 328 F.2d 404, 406-407 (4th Cir. 1964) (Clarkson) which reached the same conclusion in a usury case noting the "convenience, uniformity and simplicity achievable by having one law govern the activities of [the lender] through the several states of its operations." Notably, the rationale as set forth in these cases mirrors the concerns of Congress, as discussed, 130 years ago in enacting section 85 to apply to a national banking system operating in an interstate environment. Marquette at pp.

Third, when a loan is made, the bank is always the lender regardless of where certain functions occur. As has been stated:

> A branch is not a separate corporation or legal entity but is an office or agency operated by the legal entity which operates the main bank. It has no separate board of directors or capital structure, its deposits are pooled with those of the main bank, and its loan limits are based on the main bank's capital structure.[33]

We note, however, that the situation arising where fewer than all three of the non-ministerial functions occur in a particular host state's branch or branches raises additional considerations. One scenario in which this could happen is if a loan is approved at a home state back office, but the proceeds of the loan are disbursed to the borrower at a host state branch. The OCC letters previously discussed have addressed this type of situation.[34] In those situations, a loan would not be considered to be made in a host state based *solely* on the one or two non-ministerial functions that occurred in that state; on the other hand, non-ministerial functions beyond those ministerial functions contemplated by Sen. Roth would, in fact, be performed in the host state.[35] Neither the statute nor the legislative history specifically address whether home state or host state rates apply in that situation. While, for the reasons discussed above, we conclude that home state rates may be used, the OCC, in the interpretive letters previously discussed, has reviewed the entire transaction to determine whether there was a clear nexus between the host state, the rates of which the bank sought to apply, and the loan to justify imposition of the *host* state's rates.[36] In each of the letters, the OCC concluded that it was permissible for the lending bank to charge the rates permitted by the host state even if the borrower resided in another state. In doing so, the OCC recognized the significance of an appropriate disclosure to the borrower that the interest charged is governed by applicable federal law and the law of the relevant state.[37]

312, 314-318. Cf. Gray v. American Express Co., 743 F.2d 10, 17 (D.C. Cir. 1984) (upholding choice of law, based on principal place of business of the lender, governing contractual terms applying to cancellation of a credit card).

[33] See, e.g., Kenilworth State Bank v. Howell, 230 A.2d 377, 380 (N.J. 1967). See also Ramapo Bank v. Camp, 425 F.2d 333, 341-342 (3d Cir.), cert. denied, 400 U.S. 828 (1970) (recognizing that a bank's main office represents the legal existence of the bank). We further note that all of a bank's loans are aggregated and reported on its call report, and profits and losses arising from loans are profits and losses of the bank, a bank's directors are ultimately responsible for a bank's loan policies and standards, and compliance with restrictions on lending limits and loans to insiders and affiliates are based on relationships that borrowers have with the bank.

[34] Interpretive Letters No. 686 and 707 (proceeds disbursed at branch in host state); Interpretive Letter No. 782 (approval in branch state).

[35] Roth statement as S12789-12790.

[36] See, e.g., Interpretive Letter No. 782.

[37] Id. This determination is consistent with common law principles regarding choice of law provisions in usury and non-usury contexts. Courts have long held, even at the time of the adoption of section 85, that parties, within parameters, may choose the state whose laws will govern their transaction. See Miller v. Tiffany, 68 U.S.

5. The definition of non-ministerial functions

You next ask what we consider to constitute the making of a loan as described by Sen. Roth[38] -- that is, what constitutes approval, disbursal and the extension of the credit -- and where those actions occur.

a. Approval

You contend that a determination of where approval occurs may depend on whether a loan decision is made based on subjective underwriting criteria applied by bank personnel with the authority to exercise discretion or whether the decision is subjected to a credit-scoring model or other non-discretionary underwriting standard. You note that approval in the former situation can involve a host of factors including the circumstances underlying any past credit problems of the applicant, special strengths of the applicant, recent changes in circumstances and the nature of the relationships between the bank and the applicant and related parties. Under these circumstances, we agree that the approval cannot be considered merely a ministerial act, as described by Sen. Roth, and that the appropriate location of the approval is where the person is located who is charged with making the final judgment of approval or denial.

If, however, a loan is subject to non-discretionary criteria that will be applied mechanically, we agree with your analysis that the loan is approved where the decision to apply those criteria to that loan is made. The decision to use the credit-scoring system or other non-discretionary underwriting standard requires the exercise of skill and judgment and may have a significant effect on the credit quality of a loan portfolio. This action simply must be viewed as non-ministerial. Once that decision is made,

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298, 310 (1864) (choice of usury law among that of several states left to how parties structured their transaction). See also McAllister v. Smith, 17 Ill. 328, 333-335 (1856). This ability of the parties to make a choice of applicable usury law among jurisdictions with a nexus to the loan contract, while articulated in different ways in different jurisdictions, has been repeated over the years in both usury and non-usury cases. See, e.g., Seeman v. Philadelphia Warehouse Company, 274 U.S. 403, 407-409 (1927); Fahs v. Martin, 224 F.2d 387, 397-398 (5th Cir. 1955); Clarkson at p. 406-407 (4th Cir. 1964); Uniwest Mortgage Corp. V. Dadecor Condominiums, Inc., 877 F.2d 431, 435 (5th Cir. 1989).

Courts have recognized exceptions to this general rule if the contracts do not have sufficient links to the chosen forum) or if the law chosen violates the public policy of the forum state whose law also could be applied to the transaction. See, e.g., Solman Distributors, Inc. v. Brown-Forman Corporation, 888 F.2d 170 (1st Cir. 1989); American Star Insurance Co. V. Girdley, 12 F.3d 49 (5th Cir. 1994); General Electric Co. V. Keyser, 275 S.E.2d 289 (W. Va. 1989); North American Bank, Ltd. v. Schulman, 474 N.Y.S.2d 383 (N.Y. Co. Ct. 1984). These exceptions are inapplicable: as discussed, the OCC requires that the chosen forum have a clear nexus to the transaction and the Supreme Court has made it clear that "the interest rate that [a national bank] may charge . . . is . . . governed by federal law." Marquette at p. 308. Consequently, policies underlying federal law, not state law, are relevant and these policies are designed to promote flexibility and efficiency in lending by national banks. See, e.g., section 85; Marquette at p. 312; Tiffany at p. 413; Fisher at p. 1291 (permitting use of most favored lender rate, use of higher of several alternative rates, and use of permissible rate irrespective of the state of residence of the borrower).

[38] Roth statement at S12789.

however, the other steps in the underwriting process -- that is, the entry of the application data into a computerized or mechanistic underwriting formula -- are, to use Sen. Roth's term, ministerial, since the mere application of the particular facts to the predetermined and automatic criteria cannot alter the pre-ordained credit decision.

Of course, where a credit scoring system is utilized, but bank personnel have discretion to review and change an automatically rejected loan application, the situation becomes similar to the former situation where a loan, from the time of initiation, is to be reviewed according to underwriting criteria involving discretion. In these situations, where that discretion is actually utilized with respect to a particular loan, and where the loan previously rejected by the non-discretionary underwriting criteria is then approved, we concur, for the reasons stated above, with your conclusion that the act of final approval is non-ministerial and that the site of the final approval is the location in which it is granted.

b. Disbursal

With regard to disbursal, you contend that the relevant site is the site of "physical disbursal" of the funds or, if loan proceeds are deposited into an account of the borrower, the branch at which the account is booked. Sen. Roth distinguished between "the actual disbursal of proceeds" and "delivering previously disbursed funds to a customer." He characterized the former as non-ministerial -- "so closely tied to the extension of credit that it is a factor in determining, in an interstate context, what State's law applies."[39] While it is not possible at this time to ascertain and analyze all of the different ways in which funds can be disbursed at a branch, it is clear that where a bank gives the proceeds of a loan in-person to a customer[40] or credits the borrower's account at a branch, the funds are being "actually" disbursed at a branch and would constitute "disbursal" as contemplated by Sen. Roth. On the other hand, it appears equally clear, for instance, that if funds are disbursed by the bank to an escrow agent or title agent who, in turn, disburses them to the borrower, that would, to use Sen. Roth's formulation, constitute "delivering previously disbursed funds to a customer" and the disbursal to the customer would be a ministerial event regardless of where it occurred.

c. Extension of credit

Finally, Sen. Roth noted a third element in his formulation of the non-ministerial functions that constitute the making of a loan -- extension of credit. While it might be argued that the approval and disbursal constitute the extension of credit, you contend that Sen. Roth clearly added a third prong by separately referencing the "extension of credit" and that, in adding this, Sen. Roth was intending to incorporate the communication of the final approval by the bank to the borrower. You further contend that the relevant site is the site from which the first communication of final approval comes. We agree with your assessment. First, Sen. Roth clearly spoke of a test with three distinct elements.

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[39] Roth statement at S12789-12790.

[40] See 12 C.F.R. §§ 7.1003--7.1005 regarding the circumstances under which disbursal of loan proceeds by a bank requires branch authorization.

Second, it stands to reason that an approval of a loan or line of credit and disbursal of the proceeds in some form or fashion is of no significance if the bank does not communicate to the borrower that the loan has been approved. Approval of a credit card is irrelevant, for instance, if the applicant is never informed and never receives the card. Thus, in our view, communication from the bank to the customer that the loan has been granted complements the approval of the loan and the disbursal of the proceeds.

We also note that, while it may be argued that the closing of a loan could constitute the "extension of credit," as described by Sen. Roth, it is clear from his statement that his characterization of certain functions as either ministerial, not affecting what State's law applies, or non-ministerial, affecting what state's law applies, is based on the line that Congress drew in permitting "agency banking" activities without implicating branching concerns.[41] In adopting "agency banking," Congress explicitly provided that the closing of loans, as long as that did not implicate approval or disbursal, was to be considered a ministerial function.[42] Consequently, Sen. Roth could not have considered loan closings to be a non-ministerial function.

For these reasons, we conclude that the first communication of final approval constitutes the final element of Sen. Roth's three-part test and that the relevant site is the site from which that communication comes.

B. Conclusion

Consequently, for the reasons set forth above, we conclude that an interstate national bank may charge interest permitted by the laws of its home state unless the loan is made -- that is, the loan is approved, credit is extended and funds are disbursed -- in a branch or branches of the bank in a single host state. If one or two of those three functions occur in a host state, the bank may, alternatively, charge the interest permitted by that state if, based on an assessment of all of the facts and circumstances, the loan has a clear nexus[43] to that state.[44] Moreover, if a bank is permitted to charge the rates of a particular home or host state, it may under section 85, the usury savings clause, and the Supreme Court's decisions in Marquette and Tiffany, charge the most favored lender rates permitted by that state and may charge the permissible interest rates irrespective of the state of residence of the borrower.

I hope that this has been responsive to your inquiry.

Sincerely,

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[41] Roth statement at S12789.

[42] 12 U.S.C. § 1828(r)(1); Riegle-Neal Act Conference Report at p. 49.

[43] For examples of what the OCC has recognized as a clear nexus supporting use of host state rates, see OCC Interpretive Letter Nos. 686, 707 and 782.

[44] In any event, you have represented that the bank will include in its loan contracts choice-of-law provisions disclosing to borrowers that the interest rates are governed by federal law and the law of the relevant state.

/s/

Julie L. Williams
Chief Counsel